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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1832

ALPHONSE CIRILLO AND VINCENT MURPHY, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-1837

THEODORE ALFRED LILIENTHAL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1859

SALVATORE SORRENTINO AND LAWRENCE JOHN CESARE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-1987

ROBERT VENETUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Cirillo Pet. App. A)[1] is reported at 499 F. 2d 872. The opinion of the district court (Cirillo Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1974. Petitioner Venetucci (No. 73–1987) filed a petition for rehearing, which was denied on June 5, 1974; his petition for a writ of certiorari was filed on July 5, 1974. Petitions for writs of certiorari in Nos. 73–1832 (Cirillo and Murphy) and 73–1837 (Lilienthal) were filed on June 6, 1974. The petition in No. 73–1859 (Sorrentino and Cesare) was not filed until June 7, 1974, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, a technical defect in the initial order authorizing electronic surveillance, namely, the absence of a directive to minimize the interception of innocent conversations, requires suppression of the evidence obtained through electronic surveillance (raised in Nos. 73–1832, 73–1837, and 73–1859).

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[1] References to the various petitions and their respective appendices will be identified by the petitioners' names, *e.g.*, "Cirillo Pet."; "Cirillo Pet. App."

2. Whether, in light of the government's unchallenged *prima facie* showing that the wire interception orders in fact had been properly executed in such a manner as to minimize the interception of innocent conversations, the trial court erred in failing to conduct an evidentiary hearing on that question (raised in Nos. 73–1832 and 73–1859).

3. Whether it was error for the district court to permit a government witness, whose qualifications as an expert were not questioned, to testify about the meaning of narcotics jargon used by petitioners (raised in Nos. 73–1859 and 73–1987).

4. Whether petitioner Venetucci was prejudiced by the failure of the government to make pretrial disclosure of intercepted conversations to which petitioner was a party and which were introduced at trial (raised in No. 73–1987).

5. Whether there was a variance between the government's evidence and the conspiracy charged in the indictment (raised in No. 73–1987).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, all petitioners were convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846 (Count 9). In addition, petitioners Cirillo and Murphy were each convicted of one count of possession of one kilogram of heroin with intent to distribute that substance

(Count 1), one count of distribution of the same kilogram of heroin (Count 2), and one count of attempted distribution of one-half kilogram of heroin (Count 7), in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Sorrentino was also convicted on the same counts of distribution and attempted distribution (Counts 2 and 7). Petitioner Venetucci was convicted on separate counts of possession of the same kilogram of heroin with intent to distribute (Count 3), and of attempted distribution (Count 4), in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Lilienthal was convicted of one count of possession of the one-half kilogram of heroin with intent to distribute (Count 5) and of one count of distribution of the same heroin (Count 6), in violation of 21 U.S.C. 841 (a)(1). Petitioner Cesare was convicted of attempted possession of the one-half kilogram of heroin (Count 8), in violation of 21 U.S.C. 846 (Cirillo Pet. App. 49–50).[2]

[2] Petitioners were sentenced as follows (Cirillo Pet. App. 49–50, n. 1):

Cirillo—Concurrent terms of 14 years' and 9 months' imprisonment on Counts 1 and 2, with a 10-year special parole term; concurrent terms of 10 years' imprisonment on Counts 7 and 9, to run consecutively with the sentence imposed on Counts 1 and 2, to be followed by a 10-year term of special parole; and a fine of $10,000 on Count 9.

Murphy—Concurrent 10-year terms of imprisonment on Counts 1, 2, 7, and 9, to be followed by a special parole term of 7 years, and a fine of $5,000 on Count 9.

Sorrentino—Concurrent 10-year terms of imprisonment on Counts 2, 7, and 9, to be followed by a special parole term of 7 years, and a fine of $5,000 on Count 9.

Venetucci—Concurrent terms of 9 years' imprisonment on Counts 3, 4, and 9, to be followed by a special parole term of 7 years.

The evidence at trial is reviewed in detail in the lengthy opinion of the court of appeals (Cirillo Pet. App. 51–56). It shows that on January 18, 1973, Cirillo, Murphy and Sorrentino, acting in concert, delivered about one kilogram of heroin to petitioner Venetucci. Problems developed when Venetucci was unable to produce the purchase money for the narcotics, and eventually Venetucci was forced to return the heroin. On January 29, 1973, Sorrentino informed Venetucci that the heroin had been sold at a "loss" of $8,000 and that Venetucci and his "partner" would have to pay that amount to Cirillo (Cirillo Pet. App. 51–54).

On March 9, 1973, Sorrentino advised Cirillo that he had a prospective customer (Cesare) for a quantity of heroin, which was to be provided by Lilienthal. Delivery of a half kilogram of heroin to Cesare was planned for March 14, 1973, but the plan was aborted when Sorrentino and Cirillo could not locate their supplier, Lilienthal. On the following day, delivery was attempted again, but Cirillo and Murphy were arrested as they prepared to rendezvous with Sorrentino. At the time of their arrest, Cirillo and Murphy had a half kilogram of heroin and a small quantity of cocaine in their possession (Cirillo Pet. App. 54–56).

The government's proof consisted largely of tape recordings and transcripts of some 40 intercepted con-

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Lilienthal—Concurrent terms of 8 years' imprisonment on Counts 5, 6, and 9, to be followed by a special parole term of 5 years, and a fine of $2,500 on Count 9.

Cesare—Concurrent terms of 5 years' imprisonment on Counts 8 and 9, to be followed by a special parole term of 5 years.

versations occurring over the home telephones of Cirillo and Sorrentino, as well as the testimony of surveilling agents and a video tape of a meeting of four of the conspirators (Cirillo Pet. App. 51). Initial authorization for the wire interception of Cirillo's telephone was given in a warrant issued on October 31, 1972, by a Justice of the New York State Supreme Court, pursuant to the New York State eavesdropping statute, 11–A McKinney's Consolidated Laws of New York, Criminal Procedure Law, Sec. 700.05, *et seq.* The initial order was extended to authorize four additional 30-day periods of surveillance. The initial authorization for the interception of Sorrentino's telephone was issued on January 25, 1973, pursuant to the New York statute by a different New York State Supreme Court Justice. This authorization was extended for two additional 30-day periods (*ibid.*).

ARGUMENT

1. Petitioners contend that the absence of a directive concerning the minimization of interception of innocent conversations in the initial order authorizing the wire interception on Cirillo's telephone requires the suppression of evidence seized as a result of that, and subsequent, interceptions in this case[3] (Cirillo Pet. 14–34; Lilienthal Pet. 4–7; Sorrentino Pet. 6–11).[4]

[3] Since conversations intercepted during this initial interception period were relied on in establishing cause to issue the subsequent extensions, as well as the orders authorizing electronic surveillance of Sorrentino's telephone, the subsequent evidence, the court of appeals concluded, would presumably be "tainted" by the primary illegality (Cirillo Pet. App. 57, n. 3).

[4] Petitioners Lilienthal, Cirillo and Murphy also challenge the constitutionality of wire interceptions *per se*, as well as of

The initial warrant authorizing electronic surveillance of Cirillo's telephone was issued pursuant to the New York State eavesdropping statute, McKinney's CPL, *supra.*, Sec. 700.05, *et seq.* Section 700.30(7) of that statute requires, *inter alia*, that an "eavesdropping warrant must contain"

> [a] provision that [interceptions pursuant to] the authorization to intercept shall * * * be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article * * *.[5]

(Lilienthal Pet. App. 53–54). The warrant authorizing the initial Cirillo interception did not contain such a provision (Cirillo Pet. App. 87–90), although the orders authorizing the subsequent extensions did.[6]

The question of the validity of the warrant in question, which was issued pursuant to a state statute, is

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the New York eavesdropping statute in particular. Such an argument is without merit. See *United States* v. *Tortorello*, 480 F. 2d 764 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Cafero*, 473 F. 2d 489 (C.A. 3), certiorari denied, No. 72-1304, May 28, 1974; *United States* v. *Bobo*, 477 F. 2d 974 (C.A. 4), petition for a writ of certiorari pending, No. 73-231; *United States* v. *Cox*, 462 F. 2d 1293 (C.A. 8); *United States* v. *Cox*, 449 F. 2d 679 (C.A. 10), certiorari denied, 406 U.S. 934; *United States* v. *James*, 494 F. 2d 1007 (C.A.D.C.), certiorari denied, Nos. 73-6891 and 74-40, November 18, 1974.

[5] This section of the New York statute is basically a restatement of the minimization requirement of the federal statute, 18 U.S.C. 2518(5) (Lilienthal Pet. App. 48).

[6] The fact that all of the subsequent orders contained a minimization directive indicates that the absence of such a provision in the initial warrant was an inadvertent error of omission.

clearly a question of state law. *United States* v. *Manfredi*, 488 F. 2d 588, 598 (C.A. 2), certiorari denied, No. 73-1364, June 3, 1974. The New York decisions do not provide any definite guidance in determining the validity of a warrant in which the directive to minimize has been omitted. *Ibid.* Under federal law, however, in factual contexts similar to that presented by this case, such an omission has been viewed as a purely technical defect in the form of the warrant, not requiring suppression of the evidence obtained. See *United States* v. *Manfredi, supra; United States* v. *Rizzo*, 492 F. 2d 443, 446 (C.A. 2), certiorari denied, No. 73-6377, June 10, 1974; cf. *United States* v *Poeta*, 455 F. 2d 117, 121 (C.A. 2), certiorari denied, 406 U.S. 948.[7] The court of appeals properly followed this approach here, noting that while the initial warrant failed to contain a minimization directive, "there is other convincing evidence that the officers conducting the wiretap were aware of the minimization requirement and abided by it" (Cirillo Pet. App. 58).

The significant question in a minimization case is not whether the court order contained a directive to minimize but whether the electronic surveillance by the agents was *in fact* "conducted in such a way as

[7] In 18 U.S.C. 2518(10)(a)(ii), Congress provided the remedy of suppression of intercepted conversations where "the order of authorization or approval under which it was intercepted is insufficient on its face * * *." However, it was not the intent of Congress "to press the scope of the suppression rule beyond present search and seizure law" by requiring suppression of evidence for any technical irregularity in a warrant. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 96.

to minimize the interception of communications not otherwise subject to eavesdropping * * *." McKinney's CPL, *supra*, Sec. 700.30(7). Such a determination "requires an assessment of the reasonableness of the agents' efforts in light of the purpose of the wiretap and the information available to them at the time of interception." *United States* v. *Scott*, C.A.D.C., No. 71-1702, June 27, 1974, slip op., p. 8. See also *United States* v. *James*, *supra*, 494 F. 2d at 1018-1023. Of course, the reasonableness of the agents' conduct depends upon the facts and circumstances in each case and must be assesed in light of what appeared to the agents at the time they were monitoring the conversations (*United States* v. *James*, *supra*, 494 F. 2d at 1022); "there is patently no mechanical, hard and fast formula applicable." *United States* v. *Bynum*, 485 F. 2d 490, 500 (C.A. 2), vacated and remanded on other grounds, No. 73-856, May 28, 1974. The degree of minimization required and the adequacy of minimization thus may turn on the scope of a narcotics conspiracy and the degree of circumspection used by the conspirators in their telephone conversations, including the use of code words, narcotics jargon and guarded language, as well as "the deliberate discussion of irrelevant matters during the early moments of a conversation so that, if the conversations are being monitored, agents, assuming the call to be innocent, will cease the interception." *United States* v. *James*, *supra*, 494 F. 2d at 1019. See also *United States* v. *Bynum*, *supra*, 485 F. 2d at 500-501. The minimization requirement of the statute is satis-

fied if "on the whole the agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusion." *United States* v. *Tortorello*, *supra*, 480 F. 2d at 784 (emphasis added).

Viewing the minimization requirement in this context, it is significant that petitioners do not urge that their substantial rights were affected or that they were prejudiced in any way by the omission of the minimization provision from the initial warrant. As noted, the court of appeals found that the investigating agents were in fact aware of the requirement that they minimize the interception of innocent conversations (Cirillo Pet. App. 58–59), and the government established a "prima facie showing of compliance with the statutory minimization directive" (*id.* at 61–62). Furthermore, the warrant in question authorized the interception only of conversations to which Cirillo was a party over a particularly described telephone and which pertained to the illegal sales of narcotics, and only for a specified period of time (*id.* at 57–58, 87, 90). Such a limitation is an implicit directive to minimize the interception of innocent conversations. We agree with the court of appeals in "[r]ecognizing that [McKinney's CPL, *supra*, Sec. 700.30(7)] is essentially a summation of 'the more specific requirements of 700.30(1)–(6), all of which [lead] to minimization' * * *" (*id.* at 58). In light of substantial compliance with the statutory requirements for the contents of an electronic surveillance warrant, and because of *actual* compliance by the monitoring

agents with the statutory minimization requirement, the court of appeals correctly concluded that there was no basis for suppression of the evidence of which petitioners complain.

2. Petitioners argue that the trial court erred in denying their motion to suppress the evidence without first holding an evidentiary hearing to determine whether the investigative agents had executed the interceptions in such a manner as to minimize the interception of innocent conversations (Cirillo Pet. 34–40; Sorrentino Pet. 11–14). The trial court reviewed the monitoring agents' logs of the wire interceptions on Cirillo's and Sorrentino's telephones, as well as affidavits submitted by government officials involved in the investigation,[*] and denied petitioners' motion on the grounds that "[n]o material issue has been raised which requires a hearing * * *" (Cirillo Pet. App. 86). In a portion of its opinion upon which we rely, the court of appeals affirmed the judgment of the district court on this issue (Cirillo Pet. App. 60–62):

> The affidavits disclose in detail a clear awareness of and adherence to the minimization requirement. The Dovetko affidavit showed fur-

[*] The affidavits submitted were those of Assistant United States Attorney Heinemann, Assistant District Attorney Hershey, and Special Agent Dovetko. The affidavits filed by both prosecutors set forth their awareness of the minimization requirement and the steps taken to inform the investigative agents of this requirement (Cirillo Pet. App. 82–83). The affidavit of Agent Dovetko set forth the instructions he received from Heinemann as well as his personal knowledge of the investigative agents' efforts to minimize the interception of innocent conservations (*id.* at 61, 82–83).

ther that at all times the Cirillo and Sorrentino wiretap plants were actively manned and that of the 2774 conversations initially intercepted only 1526 conversations were listened to completely, "the agents and officers having believed at the time that the [1526] conversations were pertinent to narcotics trafficking or other criminal activity." [Footnote omitted.] Despite the ample opportunity to review the detailed and complete logs, which were made available, and to compare them with the tapes, which were also made available, appellants made no attempt to challenge the foregoing statistics or to show that any of the conversations listened to were nonpertinent to the government's investigation. In light of this failure, we hold that the affidavits supplemented by the logs and tapes were sufficient to establish a prima facie showing of compliance with the statutory minimization directive. See *United States* v. *Rizzo* [491 F. 2d 215, 217–218 (C.A. 2), certiorari denied, No. 6263, May 13, 1974]. Indeed, the prima facie showing is even stronger here than in *Rizzo,* which also upheld a wiretap conducted pursuant to the New York statute. There the state police detective who supervised the wiretap merely asserted at a suppression hearing that both monitoring and recording were stopped when it had been determined that a conversation was "not pertinent." While logs had been kept, no attempt was made to present a detailed analysis of these logs, as did the Dovetko affidavit here.

The affidavits submitted to the district court, supplemented by the logs, were more than adequate to show a good faith effort to achieve

> minimization. [Footnote omitted.] In the absence of any evidence that a substantial number of nonpertinent conversations had been intercepted unreasonably, the court was justified in denying appellants' suppression motions without holding a full adversary-type hearing.[9]

3. New York City Police Detective Garcia testified that, based upon his experience in narcotics investigations, some seemingly innocuous terms used by petitioners in their conversations were disguised references to narcotics. Petitioners argue that this testimony was improper because it invaded the fact-finding province of the jury (Sorrentino Pet. 14–16; Venetucci Pet. 19). The court below properly rejected this claim (Cirillo Pet. App. 62–63):

> Appellants, in the intercepted telephone conversations, never referred explicitly to heroin or narcotics but used such code words and terms as "kids out of school," "stuff," "dresses," or "half filled out income tax forms." New York City Police Detective Garcia, who had participated in over 100 narcotics investigations and had testified as an expert interpreter of narcotics jargon in five different narcotics cases, testified that in his opinion these terms were being used by appellants as disguised references

[9] Petitioners Sorrentino and Cesare complain (Sorrentino Pet. 13–14) that neither the logs nor the tapes were made available until after argument on the minimization issue was heard on June 3, 1973. However, the record before this Court indicates that the tapes and logs were available to defense counsel prior to June 3 (Venetucci Pet. App. 45a). Furthermore, since defense counsel did not request additional time to analyze the tapes and logs, their argument that they did not have an opportunity to review those materials is not persuasive.

to narcotics. Appellants do not object to Garcia's qualifications but argue that his interpretations should have been excluded as mere speculation or an invasion of the province of the jury. A similar argument was rejected by us in *United States* v. *Borrone-Iglar,* 468 F. 2d 419, 421 (2d Cir.), *cert. denied,* 410 U.S. 927 (1972). We see no reason to depart from that holding here, particularly since the district court instructed the jury that it was not obliged to accept Garcia's interpretations and was free to draw its own conclusions concerning the meaning of the words used by appellants.

4. Petitioner Venetucci alleges that Assistant United States Attorney Heinemann told his counsel on May 17, 1973, that no conversation of Venetucci's had been intercepted, although Heinemann did not recall having made such a statement (Cirillo Pet. App. 63–64). Prior to trial, the government furnished defense counsel with approximately 90 transcripts of tape-recorded conversations that were deemed pertinent and that might be used at trial; Venetucci was a party to none of those conversations (*id.* at 64; Venetucci Pet. App. 37a). During the fifth day of trial, government counsel informed the court that recordings of two conversations between Venetucci and Sorrentino had been discovered while reviewing the logs of the Sorrentino interception the night before. Over defense counsel's objection, the tapes and transcripts of the two conversations were admitted in evidence (Cirillo Pet. App. 64).

Petitioner contends that he was denied an opportunity to participate in the pretrial suppression hear-

ings because of the government's late disclosure of the Venetucci conversations and was unduly prejudiced because his counsel represented to the jury in his opening statement that the government had failed to intercept any conversations between him and his co-defendants (Venetucci Pet. 12–16). The contentions were answered by the court below, upon whose opinion we rely (Cirillo Pet. App. 65-67):

> We agree with Venetucci that the government should have produced the transcripts of his conversations with Sorrentino prior to trial in response to his explicit discovery requests, see *United States* v. *Crisona*, 416 F. 2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). However, we are persuaded that Heinemann's representations were in good faith and resulted from oversight on the government's part. We further doubt that Heinemann categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approximately 200, contained any Venetucci conversations.
>
> * * * * *
>
> Even assuming that Venetucci was misled by the government into believing that there were no tapes of his conversations—an assumption that is somewhat implausible, since he probably knew that he had talked with Sorrentino over the latter's phone—no real prejudice is shown. His claim that the delayed disclosure denied him the opportunity to make his own pretrial attack on the validity of the wiretap orders or on the conduct of the wiretap operation [footnote omitted] borders on the frivo-

lous. Nothing prevented his doing so, once the transcripts were offered. Yet he failed even to ask for an adjournment or continuance. Nor did the apparent contradiction of his counsel's opening statement by the two Venetucci-Sorrentino taped conversations call for a mistrial. See *United States* v. *Allsenberrie*, 424 F. 2d 1209, 1215 (7th Cir. 1970); *Pierce* v. *United States*, 414 F. 2d 163, 169 (5th Cir.), *cert. denied*, 396 U.S. 960 (1969). We are not here concerned with such vital matters as a defendant's decision to take the stand, which might result in substantial and irrevocable prejudice. See *United States* v. *Padrone*, 406 F. 2d 560 (2d Cir. 1969). Any possibility that the jury might believe that Venetucci's counsel deliberately tried to mislead them in his opening could have been dissipated by the court's explaining to the jury what had happened. Yet Venetucci made no request for an explanation. Under the circumstances the admission of the Venetucci transcripts was not reversible error.

Moreover, as the court of appeals noted, the government made the logs of the Cirillo and Sorrentino intercceptions available to defense counsel at least two and a half months before trial. On the third page of the Sorrentino logs, there was a log entry, highlighted by two asterisks, which read, "MO *Bobby*, MI *Brother—Bobby* and *Brother* discuss 'kilo' they took a loss on * * *" (Cirillo Pet. App. 65). As the court stated, "All counsel were at all times aware that 'Bobby' and 'Brother' were the nicknames for Venetucci and Sorrentino, respectively" (*id.* at 66). Since this entry was as easily discoverable by Vene-

tucci's counsel as it was by the government, it is difficult to see how petitioner Venetucci was prejudiced by the failure of the Assistant United States Attorney to discover these conversations until after the trial had begun.

5. Petitioner Venetucci argues that the government's evidence showed two separate conspiracies, rather than one continuing conspiracy as charged in the indictment, since there is no evidence of his involvement in the March heroin transaction (Venetucci Pet. 18–19).

This has become a familiar claim in cases arising in the Second Circuit, particularly in situations involving large scale narcotics distribution. See, *e.g., United States* v. *Sperling, et al.*, C.A. 2, No. 73–2363, October 10, 1974; *United States* v. *Mallah, et al.*, C.A. 2, No. 74–1327, September 23, 1974; *United States* v. *Arroyo*, 494 F. 2d 1316 (C.A. 2), petitions for writs of certiorari pending, Nos. 73–1574, 73–6610, 73–6913; *United States* v. *Bynum, supra; United States* v. *Mapp*, 476 F. 2d 67 (C.A. 2). *See also United States* v. *Rizzo*, 491 F. 2d 1235 (C.A. 2); *United States* v. *DeMarco*, 488 F. 2d 828 (C.A. 2). That court has been most sensitive to the problem and to the importance of safeguarding the rights of the accused in such circumstances. See, *e.g., United States* v. *Sperling, supra*, slip op. at pp. 5664–5665; *United States* v. *Mallah, supra*, slip op. at pp. 5494–5502. At the same time, the court has recognized the practicalities of modern-day illicit drug trafficking, which so often is as intricate as a business enterprise of the corporate variety or even a "vertically inte-

grated loose-knit combination. * * * [E]ach level of the operation depends upon the existence of the other, and the mutual interdependence of each is fully understood and appreciated by the other." *United States* v. *Bynum, supra,* 485 F. 2d at 495. See *id.* at 495–497. As the court of appeals stated in the instant case (Cirillo Pet. App. 74–77):

> We are not here confronted, however, with merely a single delivery or purchase on the part of [petitioner], which, without more, might not support knowledge of a broader conspiracy * * * but with deeper involvement on the part of each of these participants. Venetucci met on at least two occasions with all three members of the core group, took delivery of one kilogram of heroin and, when he and his partner were unable to make payment, redelivered the kilo and was informed that the core group had resold it elsewhere at an $8,000 loss, following which negotiations were conducted regarding payment of the deficit. From all of these circumstances—the large quantity, the number of meetings and his knowledge of the resale—the jury was entitled to infer that as a major retailer Venetucci knew that he was participating in a larger on-going venture. See *United States* v. *Arroyo,* 494 F.2d 1316, 1319 (2d Cir. 1974).

* * * * *

> Even assuming there was a variance between the government's proof and the indictment, we are directed to no specific prejudice resulting

from the variance and we are convinced that there could have been none. Unlike *Kotteakos* v. *United States,* 328 U.S. 750 (1945), which involved 36 alleged co-conspirators and some 8 separate conspiracies * * * here there were only 8 alleged co-conspirators and at most two separate conspiracies each of which was proved beyond a reasonable doubt by evidence relating only to it. Moreover, the trial court cautioned the jury that '[w]hether or not a defendant was a member of a conspiracy must be determined on the evidence * * * as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts, and conduct of the other alleged co-conspirators.' In *Blumenthal* v. *United States,* 332 U.S. 539, 560 (1947), which, like this case, involved a relatively small number of alleged co-conspirators and conspiracies, the Court found that a similar instruction had reduced the risk of an impermissible transfer of guilt to a minimum.[10]

[10] Petitioner Venetucci's argument (Venetucci Pet. 20), that it was error to introduce in evidence the small amount of cocaine found in the possession of co-defendants Murphy and Cirillo at the time of their arrest along with the half kilogram of heroin, is without merit. As the court of appeals pointed out, evidence of the cocaine was relevant to refute the defendants' claim that the half kilogram of heroin had been planted on Cirillo by government agents (Cirillo Pet. App. 78). Venetucci's contention, raised only in his list of questions presented and not in argument (Venetucci Pet. 3), that the evidence against him was insufficient for submission to the jury and for conviction, is equally without merit and does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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NOVEMBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974